INDEX

	PAGE
Opinions Below	1
Questions Presented	2
Argument:	
I—There was no unconstitutional suppression of evidence in this case	4
II—The fact that the prosecution called Betty Baldwin as a witness and her testimony that she had known Miller for two years violated no constitutional right of petitioner	8
III—The statement by the prosecution to Alixe Baxter that she had a constitutional right not to speak to the defense was not violative of any constitutional right	12
IV—There is no basis to apply *Haynes* v. *Washington* nor *Escobedo* v. *Illinois* to this case	14
V—Miller's confession is constitutionally unimpeachable	16
Conclusion	19

STATUTES AND CASES CITED.

Ashley v. Texas, 319 F. 2d 80, (5th Cir. 1963)	5
Angelet v. Fay, 85 S. Ct. 1750	15
Barbee v. Warden, 331 F. 2d 842 (4th Cir. 1964)	5
Brady v. Maryland, 373 U. S. 83, at 87	4
Crooker v. California, 357 U. S. 433	16
Communist Party v. Subsersive Act Control Bd., 351 U. S. 115	8
Escobedo v. Illinois, 378 U. S. 478	14
Haynes v. Washington, 373 U. S. 503	14
In re Lopez, 398 P. 2d 380	16
Lewis v. United States, 79 F. 2d 173 (9th Cir. 1939)	17

Leyra v. Denno, 347 U. S. 556 17
Linkletter v. Walker, 85 S. Ct. 1731 15
Mapp v. Ohio, 367 U. S. 643 15
Mesaroch v. United States, 352 U. S. 1, at pp. 9-10 8
Napue v. Illinois, 360 U. S. 264 10
People v. Miller, 13 Ill. 2d 84, at 111 7
Spano v. New York, 360 U. S. 315 17
State v. Johnson, 206 A. 2d 737 16
Taylor v. United States, 238 F. 2d 409 (9th Cir. 1956) .. 9
Turner v. Ward, 321 F. 2d 918 (10th Cir. 1963) 5
United States ex rel. Meers. v. Wilkins, 327 F. 2d 135 (2nd Cir. 1964) 5
United States v. Childress, F. 2d (No. 14881, decided June 29, 1965 15
United States ex rel. Walden v. Pate, F. 2d (No. 14866) decided July 27, 1965) 16
United States ex rel. Miller v. Pate, 342 F. 2d 646 . . 2, 9, 13
25 C. J. S. Criminal Law Sec. 827 17
Young v. United States, 107 F. 2d 490 (5th Cir. 1939), at p. 492 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 387 Misc.

UNITED STATES OF AMERICA, ex rel.
LLOYD ELDON MILLER, JR.,

Petitioner,

vs.

FRANK J. PATE, Warden of the Illinois
State Penitentiary, Joliet, Illinois,

Respondent.

(Petition for writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit.)

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois affirming petitioner's conviction of murder is reported in *People* v. *Miller*, 13 Ill. 2d 84, 184 N.E. 2d 455 (1958). *Certiorari* was denied, 357 U.S. 943. Petitioner then brought a Post

Conviction Proceeding which was dismissed and the decision was affirmed by the Illinois Supreme Court (non-record No. 2769). This Court denied *certiorari*, 363 U.S. 846. A petition under Section 72 of the Illinois Civil Practice Act (actions in the nature of *coram nobis*) was then filed and its denial was again affirmed by the Illinois Supreme Court, 23 Ill. 2d 420, 178 N.E. 2d 355 (1961). This Court again denied *certiorari*, 369 U.S. 826.

Thereupon the instant federal *habeas corpus* proceeding was instituted. The Federal District Court for the Northern District of Illinois granted the petition and a new trial was ordered. 226 F. Supp. (1963). The Court of Appeals for the Seventh Circuit reversed. This decision is reported at 342 F. 2d 646. This petition for *certiorari* followed.

QUESTIONS PRESENTED.

1) Whether there was a suppression of evidence in this case which is unconstitutional under *Brady* v. *Maryland*, 373 U.S. 83?

2) Whether it was unconstitutional to introduce the testimony of a witness whom the prosecution believed but who was known to have been unrealiable in the past?

3) Whether there was perjury known to the prosecution when a witness stated at one time she had met the defendant "five weeks ago" and about ten months later testified she had known him for two years?

4) Whether the statement to a witness who had already been interviewed by the defense that she "had a constitutional right not to speak to the defense attorney was a violation of the petitioner's rights"?

5) Whether the rules in *Haynes* v. *Washington*, 373 U.S. 503, and *Escobedo* v. *Illinois*, 378 U.S. 478, have any application to this case?

6) Whether the false statement that his hairs matched those recovered in the victim's body invalidated petitioner's confession?

7) Whether an unconstitutionally false statement was made in the closing argument?

ARGUMENT.

I.

THERE WAS NO UNCONSTITUTIONAL SUPPRESSION OF EVIDENCE IN THIS CASE.

Petitioner contends that a suppression of evidence unconstitutional under *Brady* v. *Maryland*, 373 U.S. 83, occurred in this case with respect to three items of evidence:

1) The hair found in the vagina of the victim.

2) The paint contained on the shorts the State contended belonged to petitioner.

3) The fact that the blood on the shorts was "probably type A".

We contend that with regard to this evidence there was no violation of any constitutional right guaranteed to the petitioner.

In *Brady* v. *Maryland*, this Court announced the rule that was to govern cases of suppression of evidence, at page 87:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

It is to be noted that this rule requires the evidence to be material. While the degree of materiality is not specified, it is indicated by the facts in the *Brady* case and in other cases where its rule has been applied.

In the *Brady* case itself the prosecution suppressed the statement of a co-conspirator that he and not Brady had

fired the fatal shot. The Court ruled this evidence material to the determination by the jury of the proper punishment. In *Barbee* v. *Warden*, 331 F. 2d 842 (4th Cir. 1964), the prosecution suppressed the fact that the accused's fingerprints did not correspond with those found in the car driven by the assailant and that the bullets recovered were not fired from the accused's gun. In *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (2nd Cir. 1964), the prosecution failed to reveal that two individuals who were at the scene of the crime stated that they did not see the accused there. In *Turner* v. *Ward*, 321 F. 2d 918 (10th Cir. 1963) in a rape prosecution, there was a failure to divulge the statement of a doctor that the victim had been subjected to sodomy, not rape. In *Ashley* v. *Texas*, 319 F. 2d 80 (5th Cir. 1963), the prosecution suppressed the fact that a psychiatrist had informed them that the defendant was incompetent.

The evidence alleged to be suppressed in this case is not material as that word was applied in these cases.

With regard to the hair found in the vagina of the victim, the Court of Appeals stated at page 652:

> "We have searched the record and find that there is no evidence that the hair found on the victim was that of the perpetrator of the crime, whoever he was. The damaged condition of the girl's body when found and the necessary handling thereof by whatever doctors or others who examined it afforded an opportunity for the accidental depositing of the surface hair from the hands, arms or head of any of the examiners. How the hair got there is purely a matter of conjecture. The chemist did not find it in the dead body, but in a plastic container, bearing a notation 'Janice May—11-26-55, Dr. R.J.H.' Obviously from the time it was found until the hair was put in a container, the body was subjected to handling by divers doctors and per-

haps police officers. Even the chemist said only that it was 'probably' of human origin.

"In view of these facts and the fact that these hairs were not admitted into evidence at the trial, the finding of the trial court that the report of the chemist was of no consequence is not erroneous. We believe it is correct."

We contend that this analysis is correct and the hair is not material evidence in the case.

With regard to the shorts, it is true that the prosecution asserted that they were blood-stained and it is also true that there was paint upon them; however, at the trial the expert chemist Litterly testified that he discovered type A blood on the shorts and he repeated that testimony in the district court (App. 511-515). James Martin, called as an expert by the petitioner in the district court, testified that he had no opinion as to whether or not blood was present on the shorts at the trial and that Litterly's tests could have withdrawn the blood or that in the time elapsed the blood could have disappeared or broken down into some other chemical substance. (App. 631-639)

Thus there can be little doubt that there was blood on the shorts at the time of the original trial. The presence of paint in addition is not material.

Finally, it is alleged that there was a suppression of evidence in allowing Litterly to testify at the trial that the blood on the shorts was Type A when he had previously written in a report that it was "probably" A.

Litterly testified in the district court:

"This is a matter of terminology in report writing that was being used at the laboratory at that time. It was the preference of Mr. Schaich, who was the

superintendent at the time, that the reports were to be written in that manner; that it was a probable result." (App. 512)

The Court of Appeals concluded, at page 653:

"We are satisfied by the record that there was no doubt in the mind of witness Litterly as to the type of blood which he found on the shorts and we, therefore, conclude that the prosecution did not knowingly permit Litterly 'to go beyond the truth.'"

Here, again, the matter in question was simply not material.

Therefore, it is concluded that no evidence which was material as that term is applied in the case law was suppressed by the prosecution in this case.

Furthermore, the *Brady* case requires that any suppression be "by the prosecution . . . upon request." Here no request was made for any of the specific items of evidence in question. A general motion was made before the trial court to allow the defense to make a scientific examination of all the physical evidence in the hands of the state. This was denied and the denial was affirmed by the Illinois Supreme Court observing that such a motion was addressed to the sound discretion of the trial court whose ruling would not be disturbed in the absence of abuse. The court indicated that since the proceeding at which the motion was denied had not been in a bill of exceptions, there was no basis to review the ruling. *People* v. *Miller*, 13 Ill. 2d 84, at 111.

Thus not only are the discrepancies complained of not material, but no request as required by the *Brady* case was properly made to the prosecution for the evidence in question. Thus no suppression of evidence unconstitu-

tional under the rule of *Brady* v. *Maryland* exists in this case.

II.

THE FACT THAT THE PROSECUTION CALLED BETTY BALDWIN AS A WITNESS AND HER TESTIMONY THAT SHE HAD KNOWN MILLER FOR TWO YEARS VIOLATED NO CONSTITUTIONAL RIGHT OF PETITIONER.

Petitioner contends that the prosecution violated his constitutional rights by calling Betty Baldwin as a witness and by not correcting her statement when she said she had known Miller for two years.

The very fact the witness was called is asserted to be unconstitutional because, it is alleged, the prosecution knew the witness to be unreliable. The petitioner, however, admittedly has no authority for this proposition. In *Mesaroch* v. *United States*, 352 U.S. 1, the Solicitor General admitted the case should be remanded to the District Court for a determination of the credibility of a key witness in light of his subsequent untruthful testimony before other tribunals. This Court, acting in its supervisory jurisdiction over the federal courts, ordered a new trial. The case does not establish that the presentation of a witness whose reliability is uncertain is a violation of due process. In *Mesaroch*, the Court carefully distinguished this case where the government questions the credibility of its own witness from one where the defense raises the issue (*Mesaroch* v. *United States*, 352 U.S. at pp. 9-10). *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, was a civil case where this Court again was acting in its supervisory capacity. Three key witnesses were discovered to

have given perjured testimony in similar proceedings. The case was reversed.

The situation here is far different. When the witness was called, the prosecution fully believed her story. Her subsequent retraction of her testimony leaves open the question of which time she was telling the truth. It is true that on about two prior occasions she told the police stories which were not believed, but on this occasion she was deemed to be speaking the truth. Her testimony was corroborated by the petitioner's own confession when he stated to the police that he committed the crime he earlier told Betty Baldwin he had committed. Knowledge of the prior unreliability of a witness cannot preclude the prosecution from believing her on a subsequent occasion and having her testify in a criminal prosecution. If a witness is unreliable, the remedy is to bring this fact to the knowledge of the jury through impeachment so that they can determine her credibility on this occasion. This was done in this case. 342 F. 2d at p. 649.

In *Taylor* v. *United States*, 238 F. 2d 409, (9th Cir. 1956), the Court discussed the effect of an unreliable witness in these words, at page 413:

> "We know judicially that the use of informer-addicts as witnesses in the prosecution of narcotics cases is common and often necessary. The motion shows that the jury which heard the evidence in the case knew that Miss Grey was an addict and a paid informer, and there was obviously no effort to conceal from the jury the fact that she may well have had the qualities of unreliability commonly characteristic of such witnesses. According to the allegations of this motion there was no attempt on the part of Agent Perry to conceal from the jury the alleged impossibility of Miss Grey's story of purchasing the cocaine in the apartment for it was the agent who testified that Miss Grey

must have passed Taylor in the foyer. Since Miss Grey went in with $30 and came back with the cocaine, whether she paid the money and got the cocaine in the foyer from Taylor who had been waiting for her there, or whether she bought it when she said she did in Stanley's apartment, was a matter for the jury to decide as was also the question whether her plainly disclosed unrealiability required them to reject her story altogether.

"It is the appellant's view that when the prosecutor observed this discrepancy between the testimony of the Government agent and the testimony of the informer, he should have dismissed the case. Under the circumstances here disclosed, we think he was not required to do so and that the motion shows no misconduct on the prosecutor's part, much less any conduct which would amount to a denial of the appellant's constitutional rights."

Clearly the fact that the prosecution presents an unreliable witness whom they believe on this occasion violates no constitutional rights of the accused.

The petitioner further contends that in allowing the statement by Betty Baldwin that she had known him for two years to go unchallenged was a violation of his rights under *Napue* v. *Illinois*, 360 U.S. 264. In the *Napue* case, a co-conspirator who was the principal prosecution witness testified that he had received no promise of consideration in return for his testimony when the Assistant State's Attorney had promised him consideration and did not correct the testimony. It was held a knowing use of false evidence and the conviction was reversed.

Here Betty Baldwin had signed a statement that she had met Miller "five weeks ago" and later testified she had known him for two years. However, her testimony at the trial was made on or about September 18, 1956, and her

statement was signed November 30, 1955, thus accounting for over nine and a half months of the discrepancy. Thus when she said she had known him for two years, the actual time according to her earlier statement would be about eleven months. The prosecution probably did not realize there was any discrepancy here at all since whether she had known Miller one or two years is immaterial.

Prior to *Napue* for known perjury to be grounds for reversal, the question involved had to relate to the question of the guilt or innocence of the defendant. In *Napue* this was extended to questions which directly related to the credibility of witnesses. Here the Court is asked to extend this concept to a question which was merely preliminary and bears no relation to the guilt or innocence of Miller, nor to the credibility of the witness. Such an extension of this concept is totally unwarranted. The question of whether the witness knew Miller for approximately one or two years is totally irrelevant.

The Court of Appeals went further and ruled that there was no necessary contradiction here at all. The Court stated at 342 F. 2d 649:

> "One may know a person long prior to the time that they meet. 'Knowing' in ordinary language meant to be 'acquainted with'. 'To meet' a person indicates a joining together in some social or other activity temporarily or otherwise."

In any event to leave such a statement uncorrected was not a violation of any constitutional rights of the defendant.

III.

THE STATEMENT BY THE PROSECUTION TO ALICE BAXTER THAT SHE HAD A CONSTITUTIONAL RIGHT NOT TO SPEAK TO THE DEFENSE WAS NOT VIOLATIVE OF ANY CONSTITUTIONAL RIGHT.

Alice Baxter owned and operated the rooming house where Miller was residing at the time of the crime. Her grandchildren Adrian and Rebecca Watters, who were then 7 and 8 respectively, were staying with her at that time. She testified at the Pardon and Parole Board Hearing that the children told her that on the date of the crime they woke Miller up at 4:00 P. M. and that at 4:30 P. M. she saw him come down stairs, and at her request he had a prescription filled for her at the drugstore (App. 818-820). The probable time of the killing was 4:00 P. M.

Petitioner contends that his rights were violated because the prosecution told Mrs. Baxter that she had "a constitutional right" not to speak to the defense attorneys and that therefore they could not learn what her testimony would be and consequently were afraid to call her as a witness.

The State's Attorney stated at the Pardon and Parole hearing that Mrs. Baxter stated prior to trial that she did not see Miller on the day in question until after 5:00 P. M. (App. 1079, 1097).

Miller's attorney, William Malmgren, had been to Mrs. Baxter's home and discussed the case with her although she did exhibit hostility at the time. He also had telephone conversations with her. (App. 941-944). He could have called her as a witness or, if she were too hostile to risk that procedure, have her called as a court's witness.

The statement that she had a consitutional right not to talk with Malmgren was not erroneous. Illinois has very little in the way of criminal discovery procedures. The truth is that she did have a right not to talk to Malmgren. The categorization of this right as constitutional neither added nor detracted from that fact.

On this issue, the Court of Appeals ruled, at page 654:

> "In this court petitioner argues that the testimony of Mrs. Baxter was crucial. There is no reason apparent in the record why she could not have been produced as a witness for the defense. If petitioner at the trial did not wish to be bound by her testimony, he should have laid a foundation by asking the court to call her as a court's witness. This would have involved his producing her in court by subpoena, calling her as a witness for the defense and having her identify herself and then proceeding to ask sufficient questions to demonstrate whether she was hostile to the defense. If this hostility had been shown, he would have been in a position to have asked that the court call Mrs. Baxter as a court witness for cross-examination by defense counsel. However, this procedure was not adopted and accordingly defense counsel did not use Mrs. Baxter as a witness, hostile or otherwise. Not only was there no error committed in this respect, but there was no deprivation of any constitutional right of petitioner in this respect. Defendant had a constitutional right to call Mrs. Baxter as a witness and there is no showing that there was any interference by the state with the exercise of that right."

No constitutional right was denied Miller in this regard.

IV.

THERE IS NO BASIS TO APPLY HAYNES V. WASHINGTON NOR ESCOBEDO V. ILLINOIS TO THIS CASE.

In neither the District Court nor the Court of Appeals did the petitioner raise the question of the applicability of *Haynes* v. *Washington*, 373 U.S. 503, nor *Escobedo* v. *Illinois*, 378 U.S. 478, to his case. He raises them here for the first time. For this reason the factual issues are not well developed.

In the *Haynes* case this Court in a five to four decision negated the confession of Haynes because they found it to be the product of coercion. It was held that a confession was not freely given when an individual was held *incommunicado* and repeatedly told that this detention would continue until he confessed to the crime in question. It was not the mere *incommunicado* detention that vitiated the confession, but actual coercion — the threat that the *incommunicado* detention would continue until Haynes confessed.

Here, while Miller alleged he was held in *incommunicado* detention for two days, he makes no allegation that any coercive threats or statements were made which would make that detention a tool of coercion as it was in *Haynes*. Absent the threat that the detention would continue until he confessed, *Haynes* is simply not applicable.

In like manner the *Escobedo* case has no application. The holding of that case was stated by this Court as follows:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the

police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'The Assistance of Counsel' . . ." (378 U.S. 478, at pp. 490-91).

Here there is absolutely no allegation that Miller ever requested to consult with his lawyer, nor is there any statement of whether or not the police effectively warned him of his right to remain silent. Absent these elements *Escobedo* does not apply.

As the Court of Appeals for the Seventh Circuit said in *United States* v. *Childress*, .. F. 2d .. (No. 14881, decided June 29, 1965) at folio page 2:

> "The record before us does not show that defendant ever requested, or was ever denied, an opportunity to consult with a lawyer. Hence the principle announced in *Escobedo* has no application in the case at bar."

These words are equally applicable to the instant case. Furthermore, the decision of this Court in the *Escobedo* case was announced long after Miller's conviction had become final. The *Escobedo* case should not be given retroactive effect.

In *Linkletter* v. *Walker*, 85 S. Ct. 1731, and *Angelet* v. *Fay*, 85 S. Ct. 1750 this Court held that the exclusionary rule announced in *Mapp* v. *Ohio*, 367 U.S. 643, was not to be applied retroactively. The Court stated that in determining whether a new constitutional pronouncement should be applied retroactively the Court would "weight the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its

operation." 85 S. Ct. at p. 1738. The Court ruled that past reliance on the *Wolf* rule was a fact and that since the purpose of the rule in *Mapp* was not to safeguard a fair trial (the evidence was as probative whether legally or illegally obtained) but to deter constitutional violations, its purpose would be served as well by prospective as by retrospective application.

In the same manner the rule in *Escobedo* changed the former law. The right to counsel had never previously been extended to extra-judicial proceedings *Crooker* v. *California*, 357 U.S. 433. Furthermore, its purpose is deterrence of violations of the right to counsel rather than the insurance of a fair trial. A confession is as credible and testimonially worthy if given in or outside the presence of counsel. Thus the same situation as pertains to the *Mapp* rule applies to the *Escobedo* rule and it also should not be applied retroactively.

This result has been reached by the Court of Appeals for the Seventh Circuit, *United States ex rel. Walden* v. *Pate*, .. F. 2d .. (No. 14866, decided July 27, 1965), the Supreme Court of California, *In re Lopez*, 398 P. 2d 380, and the Supreme Court of New Jersey, *State* v. *Johnson*, 206 A. 2d 737.

V.

MILLER'S CONFESSION IS CONSTITUTIONALLY UNIMPEACHABLE.

In the earlier *Miller* cases, the petitioner had urged that his confession was coerced. The validity of the confession was upheld and these allegations are not here repeated.

The *amicus* brief cites situations where they assert the statements in the confession are inconsistent with the

physical facts subsequently developed. As the petitioner's own brief admits (*Petition for Certiorari*, p 29) these questions are not cognizable and this proceeding will not be discussed. Two points concerning the confession, however, are raised and require analysis.

First, petitioner contends that his confession was unconstitutionally obtained because it was induced by the statement by the prosecution that the hair found in the body of the victim (see Point I) matched his.

It should first be noted that at the time this statement was made there is no evidence that the prosecution knew that it did not match his. Indeed, petitioner was given the opportunity to examine them under a microscope and he stated "Them hairs don't match . . . Them hairs don't belong to me." (Abst. 162)

Even assuming, however, that a deceit was practiced on the petitioner it is well established that a confession voluntarily made is not rendered inadmissible by the fact that a trick or similar device was practiced. In *Young* v. *United States*, 107 F. 2d 490 (5th Cir., 1939) the Court said, at page 492:

> "The confession or incriminating statement must be freely and voluntarily made, but nothing else is indispensable. A witness to one of Young's statements was a federal officer disquised as a prisoner. That a deceit was thus practiced does not exclude what Young may have freely said to him."

See also *Lewis* v. *United States*, 79 F. 2d 173 (9th Cir. 1939); and 23 C.J.S. *Criminal Law* § 827 and the cases cited therein.

These authorities control the instant situation and not *Spano* v. *New York*, 360 U.S. 315 and *Leyra* v. *Denno*, 347 U.S. 556, as contended by petitioner. Those are cases of

actual mental coercion where the accused's mind was overborne by the tactics of the prosecution. Thus in the *Spano* case the Court said, at page 323:

> "We conclude that the petitioner's will was overborne by official pressure, fatigue, and sympathy falsely aroused, after considering all the facts in their post-indictment setting."

Similarly, in *Leyra*, this Court concluded at page 561:

> "First, an already physically and emotionally exhausted subject's ability to resist interrogation was broken to almost trance-like submission by the use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution."

The confession in the instant case was not coerced and thus falls under the general rule and was admissible.

Petitioner also contends the prosecution inaccurately argued in closing that the petitioner's confession was corroborated by the fact the police went to the place where the petitioner confessed he had discarded the shorts and jacket and there discovered these garments. Petitioner argues that the garments were in fact discovered prior to the confession. Assuming this to be the fact, no constitutional right was violated. The garments were in fact discovered where petitioner said he had discarded them. Whether this occurred prior or subsequent to the confession is of little significance. In any event, the statement is not shown to have been an intentionally false statement

of such a magnitude that would deny petitioner his right to a fair trial guaranteed by due process of law.

CONCLUSION.

For the reasons stated herein, it is respectfully submitted that the petition for *certiorari* should be denied.

Respectfully submitted,

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